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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY MICHAEL
ESPINOSA,

Defendant and Appellant.

B284480

(Los Angeles County
Super. Ct. No. VA139566)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Affirmed in part and reversed in part with directions.

Michele A. Douglass, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Yun K. Lee and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Anthony Michael Espinosa (Espinosa), a felon, guilty of possessing a firearm and ammunition and found true gang allegations. On appeal, Espinosa contends there was insufficient evidence to support the true findings on the gang allegations, that his trial counsel provided ineffective assistance, and that there is a sentencing error. We agree that the true findings on the gang allegations are not supported by substantial evidence and that there is a sentencing error. We therefore reverse the true findings and remand the matter for resentencing but otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Espinosa's first trial

Based on events occurring in 2015, Espinosa was tried by a jury for possession of a firearm by a felon (Pen. Code,¹ § 29800, subd. (a)(1); count 1), possession of ammunition (§ 30305, subd. (a)(1); count 2), and resisting a peace officer (§ 148, subd. (a)(1); count 3). The jury found him guilty of count 3 but deadlocked on counts 1 and 2.²

II. Espinosa's second trial

The People retried Espinosa on counts 1 and 2. At Espinosa's retrial, Deputy Sheriff Cuauhtémoc Gonzalez testified that he was on patrol in Pico Rivera. As he drove by a known gang and drug house, he noticed a car backing out of a driveway. The car then stopped and drove forward, back into the driveway.

¹ All further statutory references are to the Penal Code.

² Because Espinosa does not raise any issue on appeal regarding count 3, we do not summarize what occurred at the first trial.

After putting his spotlight on the car, the deputy saw the front seat passenger, Espinosa, throw a gun out of the window.³ The deputy ordered Espinosa to get out of the car and to put his hands in the air. Espinosa got out of the car and ran away, but he was found and arrested later that morning.

Officers recovered a .38-caliber gun. They also found three .38-caliber bullets in the car (two under the front passenger seat and one on the floorboard).

Amber Perez, Christian Limon, Julian Garcia, and Gustavo Venegas were in the car that night with Espinosa. They, but not Espinosa, were under the influence of a stimulant.

Years before this incident, Espinosa was convicted of felony vandalism (§ 594) in 2012.

III. Gang evidence at the second trial

Deputy Edgar Romo was the People's gang expert at the second trial. He became familiar with the Pico Nuevo gang in 2007 while working at the Pico Rivera station. The Pico Nuevo gang has approximately 307 documented members. The gang's common signs or symbols are PN, PNR, and the number 76. The gang's rivals are Pico Viejo, Jardin, Mongols, Rivera, and other gangs in the City of Whittier. The house where the incident occurred is in Pico Nuevo territory and is a known Pico Nuevo hangout where drugs are used.

Deputy Romo had been involved in hundreds of investigations involving the gang and had arrested 50 to 60 Pico

³ Deputy Gonzalez knew Espinosa from a prior traffic stop during which Espinosa had admitted he was a Pico Nuevo gang member known as Tone.

Nuevo gang members.⁴ The gang's primary activities range from graffiti to simple battery, credit card fraud, possession of drugs for sales, drug use, robberies, assaults with deadly weapons, attempted murder, murder, firearm possession, and "stolen cars." Also, guns are a gang commodity, and gang members pass stolen guns to each other and use them to commit crimes. The gun Espinosa had was not registered.

In Deputy Romo's opinion, Espinosa is a Pico Nuevo gang member whose monikers are Tone and Champ. The deputy based his opinion on Espinosa's gang-related tattoos, his self-admissions contained in field identification cards (F.I. cards), and the crime itself.

The deputy also testified about the individuals who were in the car with Espinosa. Deputy Romo knew that Limon was a Pico Nuevo gang member, "[b]ecause of F.I. cards, he self-admitted, he's got tattoos, and he hangs out with Pico Nuevo gang members." Deputy Romo was familiar with Garcia "[t]hrough other deputies and other detectives." Based on F.I. cards, the deputy opined that Garcia also was a Pico Nuevo gang member. The deputy obtained an F.I. card for Venegas indicating he too was a Pico Nuevo gang member. The deputy was personally familiar with Perez. She told him that at the time of this incident she was an associate of the Pico Nuevo gang, and an F.I. card prepared by another deputy indicated that Perez was an affiliate of the gang. After the incident, however, Perez became a member of the gang.

⁴ The deputy also testified about three predicate crimes, one involving Limon.

In photographs from social media, Espinosa, Venegas, Garcia, and Limon displayed gang signs. The photographs included one taken at the house where the incident took place that morning.

Espinosa, at 29 years old, was the oldest person in the car. Perez was 20 years old, Limon and Garcia were both 18 years old, and Venegas was a juvenile. Older gang members are usually shot callers who have younger members put in work. In Deputy Romo's opinion, Espinosa was the shot caller in the group. Having "youngsters" in the car with him that night would allow Espinosa to place blame for a crime on a younger gang member. And, taking the blame for Espinosa would prove a younger member's loyalty to the gang.

Based on a hypothetical modeled on the facts of this case, Deputy Romo opined that possessing the firearm and ammunition were committed in association with, for the benefit of, and in furtherance of the gang "based on the fact that there are multiple gang members in the same car. It's very likely in my opinion that these individuals either committed some kind of crime or were on their way to commit a crime, which is a mission. [¶] If you have one veteran guy in there among—with youngsters—during that time that this incident happened, there was a war between Pico Nuevo and Pico Viejo or for this scenario here gang X against gang Y. And one of the veterans—the veteran in this vehicle had been shot back in April And prior to that date another gang member from the rival gang has been shot. So they were going back and forth. They're shooting. [¶] For the scenario, in my opinion, it's very likely that these individuals were going to go and retaliate against the rival gang."

Such retaliation bolsters the gang's reputation and instills fear in the community, benefitting the gang as a whole.

IV. Espinosa's testimony at the second trial

Espinosa testified in his defense that he was trying to find a place to stay after arguing with his wife and leaving their home. He intended to stay at his mother's house, but she had been kicked out of her apartment. Needing money for a room, he thought he could sell some Levi pants he happened to have. As he drove by the house in this case, which he knew to be a place where people did drugs, he saw his friend Limon with other people. Although Espinosa denied having previously met Garcia and Venegas, Espinosa posed with them for a photograph in which they threw Pico Nuevo gang signs. Garcia and Venegas agreed to buy pants from Espinosa but needed Espinosa to drive them home to get money.

Espinosa was standing in the driveway with the homeowner, Chino, when the spotlight was shined on them. Frightened, Espinosa ran. He denied having a gun or ammunition.

Espinosa admitted he used to "claim" Pico Nuevo. Before that, he was from Graffiti Never Dies or GND, a tagging crew, and he had prior arrests for graffiti. He claimed that he no longer belongs to a gang, and that he is trying to cover his tattoos.

V. Rebuttal evidence

Detective Stephen Valenzuela testified that a gang "frown[s] upon" a member having gang tattoos removed. He described Espinosa as a "walking billboard for Pico Nuevo with all his . . . gang tattoos. He is so far not removed as a gang

member. For him to say he's not a gang member, it's really laughable." Further, when the detective spoke to Espinosa on the day he was arrested, Espinosa admitted he had been a Pico Nuevo gang member since he was 19 years old. Espinosa also admitted being inside the car at the time of the incident.

The detective knew Espinosa from prior investigations. Three months prior to his arrest in this case, Espinosa was shot but refused to cooperate in the investigation. The day before Espinosa was shot, another Pico Nuevo gang member had shot a rival Pico Viejo gang member, triggering "a week's worth of back and forth shootings" and an "ongoing war between Pico Nuevo and Pico Viejo at that time."

VI. Espinosa is convicted of counts 1 and 2

The jury found Espinosa guilty of possessing a firearm and ammunition. The jury also found that the offenses were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1)(A).)

On August 9, 2017, the trial court sentenced Espinosa to the midterm of two years on count 1 plus three years for the gang enhancement, for a total of five years. The court imposed the same sentence on count 2, and ran the sentences concurrent. The court suspended execution of sentence and placed Espinosa on formal probation for three years. Per the minute order, the court imposed a concurrent 180 days in county jail on count 3.

DISCUSSION

I. Section 1118.1 motion

At the close of the prosecution's case, Espinosa made a section 1181.1 motion for acquittal, which the trial court denied.⁵ He now contends that the motion should have been granted as to the gang allegations because there was insufficient evidence to support them. As we now discuss, we agree.

At the close of the prosecution's case, a defendant may seek a judgment of acquittal for insufficient evidence under section 1118.1. (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 132.) Where a defendant makes such a motion, “ ‘the sufficiency of the evidence is tested as it stood at that point.’ ” (*People v. Cole* (2004) 33 Cal.4th 1158, 1213.) In reviewing a challenge to a denial of a section 1118.1 motion, “we ask whether ‘there is any substantial evidence, including all reasonable inferences to be drawn from the evidence, of the existence of each element of the offense charged.’ ” (*People v. Watkins* (2012) 55 Cal.4th 999, 1019.) The standard to determine whether the evidence was sufficient to sustain a gang enhancement is the same as whether to sustain a criminal conviction. “ ‘ “[W]e review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” ’ ” (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1104; *People v. Albillar* (2010) 51 Cal.4th 47, 59–60 (*Albillar*).) “We must presume in support of the judgment the existence of every

⁵ The motion did not specify the grounds on which it was made or that it was directed to the gang enhancements.

fact that the trier of fact could reasonably deduce from the evidence.” (*People v. Medina* (2009) 46 Cal.4th 913, 919.)

Section 186.22, subdivision (b)(1), imposes additional punishment for a “person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” The enhancement thus requires the prosecution to establish two things: first, the crime was gang related and, second, it was committed with the aforementioned specific intent. (*People v. Weddington* (2016) 246 Cal.App.4th 468, 484.) As to that first prong, to prove the crime was “gang related,” the prosecution need only prove one of three alternatives: the crime was committed “(1) for the benefit of, (2) at the direction of, or (3) in association with a gang.” (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198, italics omitted (*Morales*).)

Here, Espinosa focuses on the second prong, which requires a “specific intent to promote, further or assist criminal conduct by *gang members*.” (*Albillar, supra*, 51 Cal.4th at p. 67.) A specific intent to benefit the gang is not required, only a specific intent to assist other gang members in any criminal conduct. (*Morales, supra*, 112 Cal.App.4th at p. 1198.) When a gang member commits a crime with other gang members, that may be sufficient evidence of specific intent. (*Albillar*, at p. 68; *People v. Miranda* (2011) 192 Cal.App.4th 398, 412; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322.) Espinosa acknowledges that committing a crime with known members of a gang can raise a fair inference a

defendant had the specific intent to promote, further or assist criminal conduct by gang members.⁶

However, Espinosa also points out that the “typical close case” involving gang enhancements and specific intent is one where a gang member, acting alone, commits a crime. (*Morales, supra*, 112 Cal.App.4th at p. 1198.) Of course, Espinosa was not alone when he possessed the gun and ammunition: he was in a car with Pico Nuevo affiliates and gang members outside a Pico Nuevo hangout. Still, the court must assess the evidence that Espinosa, by his personal possessory crimes, specifically intended to further criminal conduct by his fellow gang members and affiliates, considering only the evidence that was presented in the People’s case in chief. Deputy Romo attempted to supply evidence on that point. In his opinion, it was “likely” Espinosa and the others had either just committed “some kind of crime” or were on their way to commit one.

This opinion rests on the type of “speculation, supposition and suspicion [that] are patently insufficient to support an inference of fact.” (*People v. Franklin* (2016) 248 Cal.App.4th 938, 951.) Although intent “‘is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances

⁶ Espinosa does not challenge the sufficiency of the evidence that the people in the car with him (Perez, Limon, Garcia, and Venegas) were affiliates or full-fledged members of the gang. Although the second trial occurred after our California Supreme Court issued *People v. Sanchez* (2016) 63 Cal.4th 665, Espinosa’s trial counsel did not object to gang evidence, such as the F.I. cards, under that new authority. In fact, counsel had no objection to the F.I cards, save two about Espinosa which the trial court excluded. Espinosa also does not raise any *Sanchez* issues on appeal.

surrounding the offense’ ” (*People v. Rios* (2013) 222 Cal.App.4th 542, 567–568) and a gang expert can supply evidence a jury may rely on to reach a finding on a gang allegation (*People v. Vang* (2011) 52 Cal.4th 1038, 1048; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 930), a gang expert’s opinion still “must be rooted in facts shown by the evidence” (*People v. Gardeley* (1996) 14 Cal.4th 605, 618, disapproved on other grounds by *People v. Sanchez, supra*, 63 Cal.4th 665, 686, fn. 13).

Deputy Romo’s opinion was not rooted in facts shown by the evidence. There was no evidence Espinosa and the others were on a mission or had just returned from one apart from the existence of a perpetual gang war between Pico Nuevo and its rivals.⁷ (Cf. *People v. Margarejo* (2008) 162 Cal.App.4th 102, 111 [sufficient evidence defendant possessed gun to benefit gang because he left it with fellow gang member to avoid getting caught with it].) There was no evidence, for example, that earlier that night a crime had been committed by five people in a car similar to the one Espinosa was in. (See, e.g., *People v. Miranda, supra*, 192 Cal.App.4th at pp. 404–405, 410–413 [defendant and fellow gang members used gun to commit attempted murder and robbery].) Instead, Deputy Romo further speculated that the car’s occupants were on a mission because Espinosa had been shot three months before, in April 2015, and there was a war between Pico Nuevo and Pico Viejo. Any connection between Espinosa being shot in April 2015 and his possession of a gun and

⁷ Indeed, Detective Valenzuela admitted in the prosecution’s rebuttal case that he had “[n]o evidence” they were going to commit a shooting, he was “just saying a loaded gun in a car full of gang members generally means that they’re going to go on a mission.”

ammunition in July 2015 while with other gang members high on a stimulant was tenuous. Gangs are in a constant state of conflict with each other. If this general state of warfare by itself were sufficient to establish the specific intent prong of the enhancement, then *every* gun possession committed by a gang member would qualify for enhanced punishment under that second prong of the statute. This broad interpretation of the gang enhancement would expand the boundaries of its application beyond the point of any meaningful limitation.⁸ As *Albillar, supra*, 51 Cal.4th at page 60 acknowledged, “[n]ot every crime committed by [a] gang member is related to a gang.” We therefore conclude that there was insufficient evidence to establish that Espinosa’s personal possessory crimes here were so related.

II. Ineffective assistance of counsel

Espinosa next contends his trial counsel provided ineffective assistance because he failed to object to Detective Valenzuela’s rebuttal testimony that Espinosa lied at trial. First, in his defense, Espinosa testified he did not know Garcia, Perez and Venegas, three of the people in the car with him that night. On rebuttal, Detective Valenzuela said that was a lie, because Perez told the detective that she and Espinosa used to sleep with each other.

Second, the prosecutor told the detective that Espinosa denied being a gang member and asked for the detective’s

⁸ It is worth noting that an active gang member may be charged with a felony for carrying a loaded firearm under section 25850 subdivision (c), a general intent crime not charged in this case.

“opinion about that?” The detective answered that the social media photos “speak for themselves” as did the F.I. cards and gang tattoos, so “I don’t think there’s much doubt that he is from Pico Nuevo and I would imagine everyone in this room knows that.”

Third, Detective Valenzuela then commented on Espinosa’s denial that he knew GND and Pico Nuevo committed crimes: “If there’s a violent crime . . . committed by Pico Nuevo, let’s say GND clique, these guys came up through the gang together and are friends and associates and when they commit such a crime, they know about it. For him to say that [he didn’t] know about the crimes GND or PN commit is a straight out and complete lie.”

Fourth, in response to Espinosa’s testimony he did not know the owner of the house in this case, the detective said, “These guys stop at [Chino]’s house, . . . the most notorious gang house in Pico Nuevo’s area, and he says he doesn’t know Chino, which is crazy, straight out lie as well. [¶] He knows where he’s going. He knows where he was at.”

Espinosa’s trial counsel did not object to these observations about Espinosa’s veracity, though the general rule is a witness may not express an opinion on that subject absent some expertise on determining veracity. (*People v. Houston* (2012) 54 Cal.4th 1186, 1221; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 82, fn. 25.) We will assume, without deciding, that the evidence was objectionable.

Even so, to establish that his trial counsel provided ineffective assistance by failing to object to the evidence, Espinosa must show (1) counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms and (2) counsel’s deficient performance was

prejudicial. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–688; *People v. Ledesma* (1987) 43 Cal.3d 171, 216–217.)

Espinosa has not shown he was prejudiced. First, to the extent Detective Valenzuela’s testimony was most pertinent to the gang allegations rather than the substantive offenses, we have reversed the true findings on those allegations. Second, Espinosa’s explanation that he just happened to drive by the house and did not know Garcia and Venegas was undermined by a photograph taken that very night of Espinosa with Limon, Garcia, and Venegas in which they were throwing gang signs and by other strong evidence that Espinosa was still a Pico Nuevo gang member. Third, the jury was instructed it was the sole judge of a witness’s credibility and the weight to be afforded to testimony (CALJIC No. 2.20), and that it was not bound by an expert’s opinion and could disregard any opinion it found to be unreasonable or unsupported by the evidence (CALCJIC No. 219). We therefore conclude that any error was harmless under any applicable standard.

III. Section 654

The trial court sentenced Espinosa concurrently on counts 1 (firearm possession by a felon) and 2 (possession of ammunition). He contends, the People concede, and we agree that the sentence on count 2 should have been stayed under section 654. Section 654, subdivision (a), provides that an act or omission punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but not under more than one provision. The section thus bars multiple punishments for offenses arising out of a single occurrence where all were incident to an indivisible course of conduct or a single objective. (*People v.*

Correa (2012) 54 Cal.4th 331, 335; *People v. Jones* (2012) 54 Cal.4th 350, 358.) Here, there was no evidence either that the offenses arose out of anything but a single occurrence or that Espinosa had separate objectives in possessing the gun and the ammunition. (See, e.g., *People v. Sok* (2010) 181 Cal.App.4th 88, 100; *People v. Lopez* (2004) 119 Cal.App.4th 132, 138.) The sentence on count 2 therefore must be stayed.

DISPOSITION

The judgment is reversed as to the trial court's true findings on the gang allegations under Penal Code section 186.22, subdivision (b)(1) as to counts 1 and 2 and the matter is remanded for resentencing. The trial court is directed to stay the sentence on count 2 pending completion of Anthony Michael Espinosa's remaining sentence, such stay then to become permanent. The superior court is directed to amend the abstract of judgment accordingly, and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

LAVIN, Acting P. J.

EGERTON, J.